

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

APR 17 2008

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

SUNG KEI LEUNG, a.k.a. David Leung;  
a.k.a Sugn Kei Lai,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney  
General,

Respondent.

No. 06-70313

Agency No. A35-616-723

MEMORANDUM<sup>\*</sup>

On Petition for Review of an Order of the  
Board of Immigration Appeals

Argued and Submitted March 13, 2008  
San Francisco, California

Before: RYMER, RAWLINSON, and CALLAHAN, Circuit Judges.

Sung Kei Leung petitions for review of the final order of the Board of Immigration Appeals (BIA) dismissing his appeal from an immigration judge's (IJ) decision finding him removable as an aggravated felon and pretermittting his

---

<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

application for a § 212(c) waiver under the former Immigration and Nationality Act, 8 U.S.C. § 1182(c). We dismiss the petition in part and deny the petition in part.

## I

We lack jurisdiction to consider whether the IJ violated Leung’s due process rights during reopened proceedings because the asserted deficiency is one that the BIA could have corrected on appeal but which Leung failed to raise. The issue is not, therefore, exhausted. 8 U.S.C. § 1252(d)(1); *Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. 2004).

## II

The text of IIRIRA § 321(b) plainly indicates that Congress intended for aliens to be deportable under IIRIRA’s aggravated felony definition regardless of the date of conviction (“[n]otwithstanding any other provision of law (including any effective date) . . .”). Illegal Immigration Reform and Immigrant Responsibility Act of 1995 (IIRIRA), 8 U.S.C. § 1101(a)(43); *Aragon-Ayon v. INS*, 206 F.3d 847, 853 (9th Cir. 2000). Thus, Leung is not saved by temporal limitations applicable to the definition of “aggravated felony” or to the grounds for

deportation, which have been in place since 1988. *Compare* Anti-Drug Abuse Act (ADAA) § 7344(a)(2) (codified at 8 U.S.C. § 1251(a) (1988) (“[a]ny alien . . . shall . . . be deported who . . . is convicted of an aggravated felony at any time after entry”)) *and* INA § 237(a)(2)(A)(iii) (codified at 8 U.S.C. § 1227(a)(2)(A)(iii) (“[a]ny alien who is convicted of an aggravated felony at any time after admission” is removable)).

### III

Leung is ineligible for § 212(c) relief as IMMACT’s bar, Immigration Act of 1990, § 511(a) (IMMACT) (codified at 8 U.S.C. 1182(c)), applies retroactively to aliens who were convicted following a trial of an aggravated felony. *Samaniego-Meraz v. INS*, 53 F.3d 254, 256 (9th Cir. 1995), *overruled in part by Toia v. Fasano*, 334 F.3d 917, 921 (9th Cir. 2003) (overruling *Samaniego-Meraz* to the extent it pertains to aliens who pleaded guilty prior to the enactment of IMMACT).

PETITION DISMISSED IN PART; DENIED IN PART.